No. 11,935

IN THE

United States Court of Appeals

For the Ninth Circuit

EARL DAVID FORD,
Appellant,

vs.

UNITED FRUIT COMPANY a corporation, and UNITED STATES OF AMERICA,
Appellees.

BRIEF FOR APPELLEES.

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PRELIMINARY STATEMENT.

The above-entitled cause was heard before the Honorable Louis E. Goodman, Judge of the United States District Court, all witnesses appearing in person and having testified orally. No evidence was heard by way of deposition.

We respectfully suggest to this Honorable Court that this appeal, which involves only issues of fact, is merely an attempt to have the cause heard *de novo* by this Court.

It is not believed that this Court should or will try this case *de novo*. The rule appears to be well settled that the trial court is in a better position to judge the credibility and to give weight to the evidence when all the evidence is adduced from witnesses personally present.

In the case of *Catalina-Arbutus,* 95 Fed. (2d) 283, Judge Denman of this Court stated:

> "While this admiralty appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. *Ernest H. Meyer* (9 CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; *Silver Line, et al. v. United States, et al.* (9 CCA), decided January 31, 1938, 1938 A.M.C. 521."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 Fed. (2d) 826, wherein it was said:

> "It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this court."

To the same effect are many other cases, including:

"Heranger", 101 Fed. (2d) 953 (9 CCA);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S. C. L. No. 9, 114 Fed. (2d) 964.

This Court on June 16, 1947, in the case of *Tawada v. United States,* 162 F. (2d) 615, spoke as follows on this precise point:

> "(1) In an appeal in admiralty, where 'a substantial part of the evidence was heard in open court', the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness'. Thomas v. Pacific S.S. Lines, Ltd., 9 Cir., 84 F. 2d 506, 507, 508; The Pennsylvanian, 9 Cir., 149 F. 2d 478, 481. And, 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.' "

This Court succinctly stated the rule in *Stetson v. United States,* 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th), and in *Bornhurst v. United States,* 1948 A.M.C. 53 (C.C.A. 9th), as follows:

> "The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellees and against appellant.

Should this Court determine, in its wisdom, to hear this matter *de novo,* we submit the following in reply to the appellant's brief.

STATEMENT OF FACTS AND EVIDENCE RELATING THERETO.

At the time of the accident, the subject matter of this proceeding, and on April 28, 1945, the SS "SEA PERCH" was loading some 2000 troops at Espiritos Santos, in the New Hebrides Islands. (Ap. 42, 43, 231.) Appellant, who was off duty at the time, seated himself in a most dangerous position (Ap. 21) on the vessel's rail on the main deck about 'midships, on a ¾-inch guard rail. He was facing outboard with his feet overboard and outside the vessel's railing. (Ap. 64, 193-195.) In this position, appellant was watching the embarcation of the above referred to troops.

During some of the time in which appellant remained so seated he claims he was holding onto a stanchion with one hand, but just before his fall he was not holding onto anything, nor supporting himself in any way. (Ap. 195, 196.) He testified, as did others, that the passageway between the rail on which he was sitting and the deck house was fairly congested with soldiers and not members of the crew. (Ap. 151, 200, 208.)

About fifteen minutes before Ford fell from the vessel's rail to the dock, 30 or 35 feet below (Ap. 163) the vessel's first assistant engineer, Mr. Falk, while passing by warned Ford of the danger of sitting on the vessel's rail, which he was then doing, and ordered him to get off, which order Ford ignored (Ap. 227):

> Q. (By the Court). You have a distinct recollection, you say, of this officer telling the——
>
> A. (interrupting). I do.

Q. ——fellow to get off the rail, telling Ford to get off the rail, warning him?

A. Yes.

Q. Is there any doubt in your mind about that?

A. None whatever.

There was some evidence that appellant was jostled by two men who were engaged in some harmless horseplay, both of whom were off duty at the time. (Ap. 115.) The trial court determined that appellant had placed himself in such a "most dangerous position" that any jostling by soldiers or others who were passing in the passageway, whether engaged in horseplay or not, could have caused the accident to appellant. (Ap. 21, 22.)

There was the usual horseplay aboard the SS "SEA PERCH", as aboard any other vessel. Such activities, however, aboard the concerned vessel were not excessive and were the same as encountered on any vessel. (Ap. 147-149, 208.) The appellant himself admitted that horseplay is common on all ships (Ap. 118) and the amount of such was described by other witnesses as being the average amount on any ship of that size. (Ap. 118.) The complained of horseplay had been going on only intermittently and not continuously and was variously estimated by the different witnesses as lasting from a "matter of seconds" to longer periods involving minutes (Ap. 228):

Q. You say you only saw the boys scuffling for a few seconds before Ford was thrown off?

A. Yes.

Q. How long were you there?

A. Half hour to 45 minutes.

The only evidence that any officer of the ship knew that appellant was seated on the vessel's rail in his perilous position was the testimony of Donald Fraser that he heard the first assistant engineer, Mr. Falk, order the appellant off the rail. There is no evidence that any officer of the ship saw the scuffling between Clarke and Huff or that Clarke and Huff, or either of them, saw the appellant or the precarious and dangerous position in which he had placed himself. Some of the appellant's witnesses testified that the vessel's first officer was on the landing to which the gangway leads, some 12 feet or more from where Ford had placed himself on the rail at the time of the accident. (Ap. 207.) There was no proof or evidence, however, of any kind that the first mate, if he was so stationed, knew where Ford was seated or that he saw him, nor is there any evidence of any kind to indicate that the first mate knew that the horseplay allegedly engaged in by Clarke and Huff was going on or that it came to his attention. Other witnesses who were present at the scene, as is admitted by appellant on page 5 of his brief, testified that they did not see the first mate at the place appellant claimed he was stationed. There was other evidence given by the third mate, who testified that loading time was a particularly busy one for the first mate and that he was all over the vessel at this time, with quite a bit of paper work and conferences with the transport commander. (Ap. 232.)

Nowhere in the evidence is there any indication of any injury ever having resulted from the innocent and

usual amount of horseplay as experienced aboard this and all vessels. There was not at any time adduced any evidence in support of appellant's theory that horseplay is a dangerous practice likely to result in injury to the participants or others. On the contrary, the evidence is that innocent horseplay is indulged in on all vessels—the longer the voyage, the more horseplay.

The appellant's failure to cite references to the testimony contained in the apostles, as contained in his "statement of the case", makes it impossible to answer him verbatim or to check the veracity of his statements.

ANSWER TO ARGUMENT OF APPELLANT.

Under this title appellant asserts four propositions which will be answered in the order as written.

I.

Appellant's first argument is to the effect that the Jones Act should be liberally construed. While we are willing to concede such rule and have no quarrel with the cases cited under this proposition, we respectfully point out to this Court that the cases are not even remotely in point with the facts in this matter. For example, the case of *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, cited by appellant, does nothing other than to lay down the rule as to the proofs required to set aside a seaman's release.

II.

The appellant devotes many pages of his brief to the case of *Sundberg v. Washington Fish & Oyster Co.,* 138 Fed. (2d) 801 (C.C.A., 9th) decided on November 8, 1943.

We do not believe that the case of *Sundberg v. Washington Fish & Oyster Co.* stands for the proposition claimed, or that it is in point. This Court held that the libelant, who was shot, was acting in the course of his employment while off duty by being on deck and pointing out sea lions to the other persons on board, but this Court did not hold that the member of the crew who shot the libelant was acting in the course of his employment and thusly bind the master. The basis upon which liability was fastened was the master's full knowledge of and his acquiescence in the dangerous practice of firing rifles from the deck of the vessel. The master had warned the crew to put the guns away while in Canadian waters for "we might get into trouble," but no order was given to desist from the known very dangerous practice of shooting guns from the deck of the vessel while in other waters, where the injury was suffered. After leaving Canadian waters, "*with full knowledge of the master,* several shots a day were fired, generally from the rail or from four or six feet inside the rail. On the fifth day no shooting had taken place until after the appellant had called to Taylor to come on deck to watch the play of some sea lions." Thereafter the libelant was shot. Following the accident, the master

admitted his fault, stating, "So you got it. That is too bad. *I knew I should have told the boys about those guns;* but you know how it is, I hated to do anything." (Italics ours.)

Thus we observe that in the *Sundberg* case, supra:

1. There was knowledge on the part of the master of the extremely dangerous practice of firing guns from the vessel's deck.

2. The master, in spite of this knowledge permitted the practice to continue unabated.

3. He knew the practice was likely to result in injury.

4. Such activities and practice were dangerous *per se.*

In the case at bar, as indicated in our Statement of Facts and Evidence Relating Thereto, where supporting portions of the record are cited, the evidence clearly establishes that:

1. There was no showing that innocent friendly horseplay engaged in by the crew on a long voyage was "known to be dangerous" and the evidence shows to the contrary, no injury ever having resulted therefrom.

2. There was only the usual amount of horseplay aboard the "Sea Perch" as is found aboard every other vessel.

3. There was no showing of any kind that the horseplay engaged in aboard the "Sea Perch" was likely to result in injury or harm.

4. There was no showing, and it is a fact that innocent horseplay is not dangerous *per se.*

5. The complained of horseplay was not continuous but had only been going on intermittently and lasting "a matter of seconds."

6. There is no evidence that the complained of horseplay was known to the first officer, who was claimed by *some* of the witnesses to have been at the gangplank or that he saw or knew of the alleged scuffling.

7. The appellant had been warned of the danger and ordered off the rail before he fell.

We respectfully submit that the permitting of the discharging of firearms is a very different thing from the permitting of innocent horseplay amongst men who are confined to a vessel over a period of months which is one of the traditional rights of sailors.

III.

While we likewise concede that a ship owner is under an obligation to provide a seaworthy vessel as well as a safe place to work, we are sincere in our belief that the ship owner has not failed in either of these particulars in this matter. None of the cases cited by appellant even approaches the facts of this matter as applied to the law enunciated, nor do we concede that the law laid down in the cited cases is applicable to the instant matter. We briefly comment on the following cases, each of which is relied on by appellant.

The Waco, 3 Fed. (2d) 476, was based upon an issue of fact, as is the instant matter, and the court merely held that the libelant had sustained the burden of proof in showing there was negligence on the part of the ship in failing to provide a safe and proper block and fall for the purpose of removing a heavy boiler cover in the engine room of the vessel.

Christopher v. Grueby, 40 Fed. (2d) 8, involved the use of an open gasoline can which constituted a fire hazard when the engines were running and a lack of a fire extinguisher outside the engine room of said vessel.

In the case of *Krey v. U.S.A.,* 123 Fed. (2d) 1008, there was involved an injury suffered in a shower which was not equipped with hand rails and which likewise had a slippery floor and was thusly made unsafe.

The case of *The Secandbee,* 102 Fed. (2d) 577, involved injuries which were caused as a result of two negligent conditions: the floor of the boiler room on which the air pump rested was defective and there were no guards, rails, barriers or other safety devices around the air pump, which had moving parts.

In the *H. A. Scandrett* case, 87 Fed. (2d) 708, a defective door knob was the cause of the injury.

The Dora, 28 Fed. S. 659, involved the lack of lights and the lack of a hand railing in a dark passageway.

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The Dora, 28 Fed. S. 659, involved the lack of lights and the lack of a hand railing in a dark passageway.

As all appellant seamen do, this appellant has cited the case of *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, which as this Court well knows, involved a broken and defective shackle.

The appellant next cites the case of *The Rolph,* 299 Fed. 52 (C.C.A. 9th) which merely holds "that a ship is not properly equipped for a voyage where the mate is a man known to be of most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel and uncalled for assaults on sailors." The holding in *The Rolph* could not possibly be determinative of the case at bar.

Any other authorities cited by the appellant that we have failed to comment upon are, we believe, not in point and unworthy of consideration.

IV.

Appellant's fourth and last argument is based upon the proposition that where a harmful practice or dangerous condition is known to exist or allowed to continue, the master is under an obligation to remedy the difficulty or stop the practice. As has heretofore been pointed out, there is no suggestion whatever in the record that the friendly horseplay occasionally indulged in aboard the "Sea Perch" had ever resulted in harm or injury. There was no more than the usual amount of such horseplay which is experienced on all vessels, and we believe it to be a reasonable conclusion that there would be something

wrong with the crew of any vessel that did not engage in some horseplay. The record clearly shows that on all vessels the longer the voyage, the more the horseplay. This is a normal and human tendency and anyone who thinks that such horseplay could be effectively stopped, should there be such a desire, does not know life at sea or the men that sail our ships.

As has been previously pointed out, there is not one iota of testimony that the mate or any other officer of the vessel knew that the scuffling allegedly going on between Huff and Clarke was taking place. The appellant himself, who was a good deal closer to the alleged scufflers than was the mate, did not know of it. Furthermore, there is not one iota of evidence to show or prove that either Huff or Clarke knew of the precarious position in which the appellant had deliberately placed himself, contrary to orders.

The appellant admits on page 30 of his brief that "the courts have established as one of the prerequisites that the employer must have acquired knowledge through its officers of the unsafe conditions." He then proceeds to state there was some testimony that First Mate Schaefer was on the gangplank platform for some forty-five minutes prior to the accident. Other witnesses who were there testified that they did not see the mate, and the third mate testified that he had a number of duties about the vessel. At best, the most that can be said for appellant's position is that there was a conflict of the testimony

in this regard and the trial court, before whom all the witnesses personally appeared and testified, chose to believe the evidence of the appellees.

The case of *Kochler v. Presque-Isle Transportation Co.,* 141 Fed. (2d) 490, cited by appellant, is another case of an assault committed by an assaulter who was a person of vicious and belligerent character and likely to inflict bodily harm on other members of the crew, and such facts were known to the officers of the ship. A serious assault had been made on the libelant in the presence of one of the ship's officers, and there was no question but that the belligerant and harmful proclivities of the assaulter were known to the ship's officers.

In the case of *Kyriakos v. Goulandris,* 151 Fed. (2d) 132, also relied on by appellant, the court found Bouritis, the assaulting seaman, to be a marijuana addict. He had threatened the libelant on many occasions and the court found that the master knew, or at least should have known, the assaulter was a man of vicious and violent character and irrational. The case is replete with instances where the libelant had been repeatedly threatened and abused, he previously having appealed to the master for help and protection which was denied him.

We cannot see why the case of *McGee v. Sinclair Refining Co.,* 47 Fed. Supp. 912, which appellant has cited, is in any way here controlling. The case involved the practice of permitting a vicious dog to roam about the decks of the vessel unfettered in

any way. The court took care to point out that the dogs aboard the ship prior to biting the libelant "had snapped at members of the crew and had bitten an ablebodied seaman, and also that seamen were scared at night by reason of them when they were taking over the wheel; that the sailors made complaint about the dogs and their conduct aboard the ship on at least two occasions, and that the dogs on occasion would bite." The court held that the foregoing facts constituted notice and knowledge of the likelihood of the dogs' seriously injuring someone.

APPELLEES' ARGUMENT.

As the appellant cites a large number of assault cases in support of his position, we think it only appropriate to point out that while in some cases liability can be imposed upon the ship owners on the theory of *known* vicious, brutal and violent characteristics and propensities of the assaulter, we believe it equally clear that such facts must be affirmatively shown or the assault must be committed in the furtherance of the ship's discipline or the ship's business.

In the case of *Yukes v Globe S.S. Corporation,* 107 Fed. (2d) 888, the court denied recovery to the appellant because the assault involved was not in the furtherance of the ship's business. The court stated:

> "The difficulty with the appellant's case is that there is nothing to connect Cope's assault upon

him with discipline or the ship's business, or to bring it within the actual or constructive scope of his authority."

The court further held that the assertion of the assaulter that "I am an officer" added nothing to the case. Thus, it is clear that all assaults are not compensable and recovery cannot always be had against the ship owner as is claimed by appellant.

In *Nelson v. American-West African Line, Inc.,* 86 Fed. (2d) 730 (C.C.A. 2nd), it was held that in order to permit recovery by a seaman who was assaulted in bed by a drunken boatswain, before recovery could be allowed the boatswain must be determined to have acted within the scope of his authority in the furtherance of the ship's business.

It is obvious that the facts of the instant case do not bring us under the law laid down by any of the foregoing cases.

While the vicious propensity rule applies with equal effect to officer and fellow seamen, we believe it clear that in assaults committed by fellow seamen of equal rank, no vicious propensities having been shown, liability does not attach to the vessel. Such assaults to be compensable in damages against the ship owner must be committed by superior officers in furtherance of ship's business.

In the case of *Lykes Bros. S.S. Co. v. Grubaugh,* 128 Fed. (2d) 387 (C.C.A. 5th), at page 391, the court fully considers the question of the shipowner's

responsibility in "assault" cases. This excellently considered opinion states as follows:

> "The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in *Medlin Milling Co. v. Boutwell,* 104 Tex. 87, 133 S. W. 1042, 34 L.R.A., N. S. 109, and *Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. In *Jamison v. Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and *Alpha Steamship Corp. v. Cain,* 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, applying to assaults on shipboard, the rule of the Green case, the Supreme Court declares that the employer may be liable under the Jones Act only when the assault is committed by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of those cases the assault was by a superior officer upon a subordinate employee whom the assailant had the power and authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his superior or by the head of one department upon the head or

an employee of another department over whom the assailant has no authority or direction or control. None has held the master liable where as here the assault occurred as the result of anger over matters having nothing to do with the exercise, over the assailed, of authority delegated by the master to the assailant in the discharge of duties with which the master had charged him. It is the appellant's position that the case fails here both because the engineer had no authority or control over the steward and because if he had, the evidence not only wholly fails to establish that the assault was committed in attempting to carry out the master's business but on the contrary it affirmatively shows that it was a personal quarrel to vent the drunken spleen of the engineer."

The foregoing case was reconsidered on rehearing in 130 Fed. (2d) 25, and was affirmed; additionally, maintenance was awarded. The opinion was not otherwise modified.

This same subject was given extensive treatment by the Second Circuit Court of Appeals in the case of *Bonsalem v. Byron S.S. Co.,* 50 Fed. (2d) 114 (C.C.A. 2nd). At page 115, the court states as follows:

"The ship or shipowner is not liable for injuries received by a seaman from an assault committed outside the scope of the employment of those on the vessel who are alleged to have assaulted him. This appellee was assaulted without provocation, and the assault was not committed by any officer of the vessel in furtherance of the appellant's business. The appellant did not authorize the of-

ficers of the ship to beat and assault him without cause or for a reason unconnected with the navigation of the ship."

To the same effect, see *Pittsburgh S.S. Co. v. Scott,* 159 Fed. (2d) 373, (C.C.A. 6th) (1947), at page 376:

"A willful assault perpetrated 'to satisfy the temper or spite of the employee', not done in an attempt to further the employer's business, does not render the master liable for his servant's wanton acts."

Lykes Bros. S.S. Co. v. Grubaugh, 5 Cir., 128 Fed. (2d) 387.

See also *Brailas v. Shepard S.S. Co.,* 152 Fed. (2d) 849 (C.C.A. 2nd), wherein the applicable law is carefully set forth as follows:

"* * * It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business; the fact that the injury is done during the continuance of employment is not enough. *Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Bonsalem v. Byron S.S. Co.,* 2 Cir. 50 Fed. (2d) 114; *Lykes Bros. S.S. Co. v. Grubaugh,* 5 Cir., 128 Fed. (2d) 387, modified on rehearing 5 Cir., 130 Fed. (2d) 25.

"* * * Even assuming, however, as plaintiff contends, that Dolanides stabbed him in an effort to regain possession of his position at the throttle, the defendant company cannot be held responsible for Dolanides' act. An assistant engineer can hardly be said to act in furtherance of his

> master's business when he assaults the chief engineer as the latter attempts to take control at a time of emergency. The case on its facts is clearly distinguishable from cases relied on by the plaintiff where a superior officer injured a seaman in the act of prodding him to work. *Jamison v. Encarnacion,* 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S.S. Corp v. Cain,* 281 U.S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Nelson v. American-West African Line,* 2 Cir., 86 Fed (2d) 730, certiorari denied *American-West African Line v. Nelson,* 300 U. S. 665, 57 S. Ct. 509, 81 L. Ed. 873. Hence the court committed no error in refusing to submit this issue to the jury and in refusing plaintiff's requests to charge based upon the contrary theory."

By no stretch of the imagination can the case at bar be held to be within the foregoing rules of law. As we have heretofore shown this Court in replying to appellant's arguments, the horseplay indulged in aboard the "SEA PERCH" (a) was not dangerous; (b) had never resulted in injury; (c) there was only the usual amount aboard the "SEA PERCH" as aboard any other vessel; (d) such activities were not excessive, the appellant himself admitting that horseplay is common on all ships; (e) the complained of horseplay was not continuous but had only been going on intermittently and lasting from "a matter of seconds" to longer periods involving minutes. Nor was such horseplay dangerous *per se* or of a vicious, cruel or inhuman nature. As previously commented, we question whether a ship has ever sailed whose crew did not engage in some horseplay.

The record will show that the appellant placed himself in a position which was most likely to result in serious injury to himself. (Ap. 64, 193-195.) We know of no more dangerous position in which he could have placed himself aboard the vessel under the circumstances then existing, nor one more likely to result in his injury. He sat on the vessel's rail facing outboard with his feet over the vessel's side. The rail on which he was perched was a ¾-inch pipe railing. It is difficult to describe the recklessness of his act. In assuming the position which he did it was almost certain that serious injury would result to him. It is nothing short of incredible that appellant persisted in remaining in the described precarious and frightfully dangerous position even after having been ordered away from the rail by one of the vessel's officers, whose order he did not obey.

Appellant's arguments that the vessel's officers permitted him to remain in the described position by not ordering him off in view of the evidence, are ridiculous and absurd, and we do not believe will be seriously regarded by this Court. That the appellant was under a duty to use all reasonable care to prevent injury to himself cannot be successfully challenged. The appellant not only failed to use any care whatever for his own safety but on the contrary placed himself in a most dangerous position. Certainly no other position could be more calculated or certain to result in his injury.

The language of this Court in the case of *Drain v. Shipowners & Merchants Towboat Co., Ltd., et al*

149 Fed. (2d) 845, 1945 A.M.C. 892, is, we believe, authoritative. The injury occurred to Drain when in approaching the pier he stood on the guard rail of the tug, outside of the rail, ready to take a mooring line to the pier. He was caught between the side of the tug and a hanging fender as the tug swung toward the pier, and his leg was broken and crushed. This Court in denying a recovery held that appellant was not given an unsafe place to work and was not ordered into an unsafe place, and that appellees warned Drain when he took a post of danger and he failed to heed the warning.

Also see *Wallace v. Delaware River Ferry Co. of New Jersey,* 1943 A.M.C. 1203.

In the case of *Vileski v. Pacific-Atlantic S.S. Co.,* 163 Fed. (2d) 553 (C.C.A. 9th), decided by this Court on August 29, 1947, the libelant was injured while repairing certain relief valves over the vessel's boilers, and in working over these valves the libelant was standing on a hand rail, claim being made that the vessel had failed to provide a staging. The court stated:

> "It is thus clear that the district court was entitled to infer that the only negligence causatively contributing to libelant's injury was in libelant in choosing to work on the rail, installed for an entirely different purpose, and in failing in his duty to install the convenient staging. *Drain v. Shipowners & Merchants Towboat Co.,* 9 Cir., 149 Fed. (2d) 845, 846.
>
> "The hand rail for use in heavy seas is no more defective or dangerous per se than are the ship's

> sides to keep out such seas. As well could it be said of a deck crew, ordered to paint the ship's sides, who chose to do so hanging by individual ropes lashed to the ship's rail instead of using the available customary staging and rigging for that purpose, that they were ordered to work in a dangerous place."

A more recent case decided by this Court and on all fours with the case at bar is that of *Bornhurst v. U.S.A.*, 164 Fed. (2d) 789, 1948 A.M.C. 53 (C.C.A. 9th), certiorari denied 92 L. Ed. 700. This Court denied recovery to another libelant who was seriously injured while satisfying his own curiosity. Bornhurst's personal negligence certainly was nominal compared to that of appellant herein. This Court, affirming the District Court and denying recovery, stated:

> "The court further found * * * 'The libelant, voluntarily and not in the performance of any work or duty which he was required to do or perform, placed his hands on the edge of said tank and leaned forward, supporting his weight by his hands, for the purpose of examining the inside of said tank. Said acts on the part of the libelant were prompted solely and exclusively by the libelant's curiosity, and the libelant sustained injury to his hands when said tank top suddenly descended and pinched the libelant's fingers between the under surface thereof and the rim of said tank. * * * The libelant had no duties of any kind to perform at or near the tank top, and if the libelant had continued in the performance of his regular duties, he would not have been injured. The tank top * * * was a heavy, movable

> and moving device, weighing approximately 600 pounds, and the fact that it was a heavy, movable and moving device was obvious to any person observing the same, and the libelant had knowledge that two other seamen were performing work with reference to said tank top.'
>
> "The findings are supported by substantial evidence, are not clearly erroneous and hence should not be disturbed. Upon the facts found, the court correctly concluded that appellant was not entitled to recover, and that the libel should be dismissed, with costs to appellee." (Underscoring ours.)

This Court also held on December 16, 1947, in the case of *Meintsma v. U.S.A.,* 164 Fed. (2d) 976, 1948 A.M.C. 144 (C.C.A. 9th), that the libelant, who jumped from a gangplank instead of requesting that it be lowered, "assumed all risk of injury."

In *Paul v. U.S.A.,* 54 Fed. Supp. 60, the court held that libelant took a chance on a stormy night to use a gangplank which a watchman had warned was unsafe. The libelant was not on duty at the time and there was no need of haste. The court made the following pertinent observations of the law involved:

> "(2) Conceding, for the present purposes, that libelant was so faced by the consequences of negligence, he voluntarily exposed himself to, and assumed the risk of, such known and appreciated dangerous consequences; not only did he take no precautions whatever to avoid such ill results to himself as might reasonably have been anticipated would come to him if and when he were compelled to board the vessel in line of duty with

such consequences still existent, but he deliberately flirted with the dangerous situation, and although he was otherwise in no hurry to board the vessel, was not under compulsion to return to the ship from his shore leave until eight o'clock the succeeding morning, was engaged in no service for his employer and was under no orders whatever, he elected 'to take a chance,' as he, himself, testified; he gambled with the known danger, lost his throw, and now seeks to have himself indemnified for his foolhardiness, if, as a matter of fact, the proximate cause of all the ills which he represents himself to have borne since the night of February 16th, 1926, until the filing of his suit on December 29, 1932, were actually found to be his fall from the gangway extension.

"(3) By his own negligence libelant brought upon himself whatever injury he suffered and he cannot be permitted, in justice, to recover damages for it. One cannot deliberately incur an obvious risk of personal injury from a dangerous situation which he charges to have been created by the negligence of another,—when he is under neither compulsion nor necessity to place himself within range of the operative influence of such situation and may rely upon preventive measures being taken to dispose of the inherent danger before he need do so,—and then be heard to contend that he should be permitted to recover from the author of the danger such damages as he sustained by reason of ensuing injury. *Baltimore & Potomac R.R. Co. v. Jones,* 95 U. S. 439, 24 L. Ed. 506 (1877); 38 Am. Jur. (1941) 'Negligence,' § 171, pp. 845-846."

We believe this case strikingly similar to the facts now before this Honorable Court.

In the case of *Jackson v. Pittsburgh S.S. Co.,* 131 Fed. (2d) 668 (C.C.A. 6th), the court denied recovery to a seaman who jumped ashore in the absence of a ladder or gangplank, holding that when he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured "in the service of the ship." The court in denying recovery for both *damages, maintenance and cure* in the *Jackson* case made the following very pertinent observations, which we believe apply with equal force to appellant's claim:

> "(2-4) While maritime law imposes a duty upon the owners of a vessel to care for a seaman who falls sick or is injured in the service of his ship to the extent of his maintenance, cure and wages (*The Osceola,* 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760), in order to recover, an injured seaman must have acted without gross negligence or misconduct (Olsen v. Whitney, D. C., 109 Fed. 80), and his own wilful wrong-doing gives him no rights against the vessel or her owners (*The S.S. Berwindglen,* 1 Cir., 88 Fed. (2d) 125). The phrase 'in the service of the ship' does not extend the obligation of the vessel or its owners to injuries received by a seaman while engaged in his personal affairs. *Collins v. Dollar S.S. Lines, Inc.,* D.C. S.D. N.Y., 23 Fed. Supp. 395, 397. When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation

> to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. *Th Osceola,* supra; *Meyer v. Dollar S.S. Line,* 9 Cir., 49 Fed. (2d) 1002."

We believe it to be elementary that the well known "skylarking" or "horseplay" rule exempts an employer from liability for injuries where a person other than those engaged in the horseplay or scuffling may suffer injury therefrom. 35 Amer. Juris. 630. The rule is well stated as follows:

> "§ 201. *Injury by Act of Another Employee in Sport or Play*—It is well settled that an employer is not to be held liable at common law for injuries inflicted upon an employee in sport, or as a result of 'skylarking' or 'horseplay,' by other employees not acting in the performance of any duty owing to the master, in the absence of anything to show that the injury was authorized by the employer or anything to show that the injury amounted to a violation by the employer of some duty owing to the injured employee."

Also see 39 *Corpus Juris* 546 for the same rule.

The rule being so well known and established, we do not feel it requires any further support.

In *Finnemore v. Alaska Steamship Company,* supra, 13 Wn. (2d) 276, 124 P. (2d) 956, the court quoted with approval from *Pittsburgh Steamship Co. v. Palo,*

supra, 64 Fed. (2d) 198. As a preliminary to the quotation, the Washington court said:

> "It is also the well established rule that no act or omission of the shipowner may be considered negligent unless the danger of injury was reasonably foreseeable."

APPELLANT'S CLAIM FOR MAINTENANCE.

The trial court did not err in refusing further maintenance. The record shows conclusively that the appellant received all wages due him and maintenance up until December 5, 1946, at the rate of $3.50 per day. (Ap. 189-190.) No evidence of any kind was offered by appellant as to what appellant's "maintenance" cost him, and appellant's counsel in open court stated that it was up to the court to determine whether $3.50 per day was a reasonable amount. (Ap. 184.) After some discussion with respect to the amount of any maintenance due, past and future, appellant's counsel stated:

> "Mr. Ames: Well, I won't press it." (Ap. 187.)

The medical reports contained in the Marine Hospital's file, Exhibit 2, shows that appellant was discharged as fit for light duty on December 5, 1946, which is the date to which his maintenance was voluntarily paid him. He actually returned to work on December 21, 1946 (Ap. 181) and presumably between December 5 and December 21 was looking for em-

ployment, which the record discloses he commenced on December 21.

We respectfully submit that the record is devoid of any evidence entitling appellant to any further maintenance.

CONCLUSION.

We respectfully submit that the trial court, having heard all witnesses testify in person before it and having resolved all material allegations in favor of the appellees and against the appellant, the decree should for the reasons previously stated be affirmed.

Dated, San Francisco, California,
October 4, 1948.

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